

3 May 2024

Your ref:
Our ref: MDSS/KXMS:3713926All correspondence to:
PO Box H316

AUSTRALIA SQUARE NSW 1215

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Dear Wes

Advice in relation to proposed conditions for Concept Development Application DA/2023/0467
Property: 469 – 483 Balmain Road, Lilyfield

We refer to your request for advice in relation to Council's Requests relating to the imposition of deferred commencement conditions (**DC**) and the delivery of Stage 2 of Development Application DA/2023/0467. Specifically, you have asked us to advise on whether a deferred commencement condition is required or appropriate to secure the delivery of the employment uses contemplated in Stage 2 of the concept development application.

Summary advice

In our view having regard to the Development Application documents, applicable legislative provisions and Court's consideration of similar applications, we advise as follows:

- The imposition of a deferred commencement condition is not warranted or required to ensure delivery of Stage 2 and the associated employment floor space.
- The concept DA must be "operational" in order for Stage 2 to be approved.
- If a deferred commencement condition was imposed, the Stage 2 DA could not lawfully be approved or commenced as the Concept DA would not "operate" in a legal sense to authorize the approval of the Stage 2 development.
- Any condition which is imposed ought only require that the Stage 2 approval be obtained – not completed – and commenced, prior to the issue of any OC for the residential component.
- The statutory scheme makes express provision to ensure that subsequent applications comply with any concept approval relating to a site (see s.4.24(2) *Environmental Planning and Assessment Act 1979*). This provision itself provides the requisite level of certainty.
- Once commenced, the Council has an express power to require the developer to finalise (see Sch 5, Pt 1, Order No. 13 *Environmental Planning and Assessment Act 1979*)
- Council would retain the same level of certainty for the delivery of the employment floorspace if the requirements relating to Stage 2 were provided prior to issue of a CC. This would mean the development could not commence until such time as an approval for Stage 2 was obtained and an OC for the residential component could not be obtained until such time as a CC was issued for Stage 2 and work commenced on that position.

Background

We understand the background facts to be as follows:

1. On 19 June 2023, you lodged Development Application DA/2023/0467 with Inner West Council which seeks consent for a concept development including detailed (Stage 1) development for a mixed use development comprising of a residential flat building and light industry uses.
2. Further amendments have been made to the concept application and will be provided to Council in response to the latest RFI from Council. One of the amendments was the removal of demolition of the single storey building between the retained character buildings fronting Balmain Road from Stage 1 to Stage 2 so that the redevelopment of this building including any demolition and detailed design is dealt with in the same stage.
3. Council has now proposed a deferred commencement condition which seeks to require the Stage 2 works to be completed prior to the Stage 1 consent operating.
4. You have sought our (Mills Oakley) advice in relation to the matters identified in the RFIs.

Please advise whether any of the above facts are incorrect as this may change our advice.

Detailed advice

1. Legislative framework

- 1.1 The EPA Act makes express provision to ensure that subsequent detailed development applications on land to which a concept development approval relates are consistent with the original approval.

- 1.2 Relevantly, s. 4.24 of the EPA Act provides:

“4.24 Status of concept development applications and consents

(cf previous s 83D)

(1) The provisions of or made under this or any other Act relating to development applications and development consents apply, except as otherwise provided by or under this or any other Act, to a concept development application and a development consent granted on the determination of any such application.

(2) While any consent granted on the determination of a concept development application for a site remains in force, the determination of any further development application in respect of the site cannot be inconsistent with the consent for the concept proposals for the development of the site.”

- 1.3 The effect of this from a practical perspective is that any subsequent DA – such as the Stage 2 DA – can only be approved in a manner that is consistent with the concept DA.

- 1.4 If a concept DA specifies, and mandates, the delivery of for example an area of commercial floor space, the delivery of that floor space in the amount nominated must be provided – and if not, that subsequent DA cannot lawfully be approved.

- 1.5 Section 4.16 of the EPA Act authorizes the way in which a consent authority may approve a development application and the impact of that approval, if done in a particular way. It provides:

“4.16 Determination(cf previous s 80)

(1) General A consent authority is to determine a development application by—

- (a) granting consent to the application, either unconditionally or subject to conditions, or*
- (b) refusing consent to the application.*

(2) Despite subsection (1), the consent authority must refuse an application for development, being the subdivision of land, that would, if carried out, result in a contravention of this Act, an environmental planning instrument or the regulations, whether arising in relation to that or any other development.

(3) “Deferred commencement” consent A development consent may be granted subject to a condition that **the consent is not to operate until the applicant satisfies the consent authority, in accordance with the regulations, as to any matter specified in the condition.** Nothing in this Act prevents a person from doing such things as may be necessary to comply with the condition.”

- 1.6 Although the provision authorizes works to be done to satisfy the deferred commencement, the approval of the Stage 2 detailed DA cannot occur in accordance with the Concept DA because the concept DA simply will not operate until such time as the DC is satisfied.
- 1.7 This is a catch 22, but one which is simply resolved by the imposition of an operational condition which ties the delivery and occupation of the Stage 1 works with the development authorized by any stage 2 DA.
- 1.8 Finally, Schedule 5, Part 1 Order 13 of the Act authorizes the Council to require that works approved by a planning approval to be finalized. That provision provides:

Number	To do what	When	To whom
13	Complete Works Order To complete authorised works under a planning approval within a specified time	The authorised works have commenced, but have not been completed, before the planning approval would (but for the commencement of the works) have lapsed.	The owner of the relevant land

- 1.9 Accordingly, once works have commenced on any development approved by Stage 2, the Council can require that those works be completed and finalized.

- 2. How can council retain the certainty that the Stage 2 works will be delivered by way of condition?**
- 2.1 The imposition of a simple operational condition on any approval of the concept development application which tied the delivery of the works approved in Stage 1 to the works approved in any Stage 2 DA would wholly resolve any issues relating to certainty.
- 2.2 The Stage 2 DA cannot lawfully be approved until the Concept Development Consent is 'operational' and any deferred commencement condition satisfied.
- 2.3 The Concept Approval authorizes the Stage 2 development and must be legally 'operational' in order for that approval to be granted.
- 2.4 That is because s. 4.16 explains that the Concept Development Consent simply would not "operate" in a legal sense until such time as the deferred commencement condition was satisfied.
- 2.5 What this means practically is that any deferred commencement condition which required the Stage 2 DA to be approved prior to the Concept Development Consent operating would not be capable of satisfaction.
- 2.6 Additionally, the Stage 2 DA could not be approved on a standalone basis as it would not satisfy the minimum floor space requirements contained within the IWLEP.
- 2.7 The situation creates a legal impasse because in order to satisfy any Deferred Commencement condition an approval would be required to be obtained for the Stage 2 works under the Concept DA – which at that time would not be "operational".
- 2.8 There are a number of ways which could feasibly resolve this issue.
- 2.9 The first way is to impose a condition which prevented a CC being obtained for any Stage 1 works until such time as an approval for Stage 2 was obtained.
- 2.10 This would ensure that no development under Stage 1 could be carried out until such time as the detailed design for Stage 2 had been finalized and approved.
- 2.11 This approach could be supplemented by a condition which prevented the grant of any occupation certificate for the stage 1 works until such time as a CC had been issued and works commenced under the Stage 2 DA.
- 2.12 This would ensure council had the power to issue an order requiring that the Stage 2 development be finalized and also incentivize the developer to commence that work in order to obtain an OC for the Stage 1 works.
- 2.13 Although in our view, an approach which restricted the issue of an OC for Stage 1 until such time as Stage 2 had an OC, is not necessary, this approach could be adopted to ensure that the commercial floor space under Stage 2 was delivered prior to any OC for the Stage 1 works.
- 2.14 If this approach was adopted the conditions of any Stage 2 consent would need to be reviewed closely to ensure that an OC was permitted to be issued for the standalone building prior to the completion of Stage 1 works.
- 2.15 In our view, it is plain that a deferred commencement condition is not required or legally available in this circumstance.
- 2.16 A simple operational condition which tied delivery of Stage 2 to the delivery and occupation of Stage 1 will provide the level of certainty required by Council to ensure that the Stage 2 works were commenced and complete contemporaneously with the Stage 1 works and before any occupation of the residential component.

3. Conclusion

- 3.1 In our view there are simple and practical ways in which council can be satisfied that the employment floor space authorized under the Stage 2 DA will be delivered.
- 3.2 The imposition of a deferred commencement condition is not warranted or legally available in the current circumstances and ought not be imposed.
- 3.3 It is possible to require simply that the Stage 2 DA be commenced or completed prior to the issue of an OC for the development approved by the Stage 1 DA.
- 3.4 We recommend that you bring the above matters to the attention of Council. If you have any questions, please call Matt Sonter on direct line (02) 8035 7850 or msonter@millsoakley.com.au or Kate Marginson on direct line (02) 8035 7851 or kmarginson@millsoakley.com.au.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Matt Sonter', written over a horizontal line.

Matt Sonter
Partner